IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

SOUTHERN COUNCIL OF INDUSTRIAL WORKERS,
Plaintiff

NO. 3:96CV139-B-B

v.

MEMPHIS HARDWOOD FLOORING COMPANY,
Defendant

ORDER

In accordance with the memorandum opinion this day issued, it is **ORDERED**:

That the plaintiff's cross-motion for summary judgment is **DENIED**; and

That the defendant's motion for summary judgment is **GRANTED**.

THIS, the _____ day of April, 1997.

_____
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

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MEMORANDUM OPINION

This cause comes before the court on cross-motions for summary judgment. The sole issue before the court is whether the parties to this action have agreed, through the language of their collective bargaining agreement, to submit a particular dispute to arbitration. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

Plaintiff Southern Council of Industrial Workers ("Union") is an unincorporated association and labor organization representing employees of Defendant Memphis Hardwood Flooring Company ("Company"). The Union and the Company are parties to a collective bargaining agreement ("agreement") covering the unit of production, yard, and maintenance employees as well as truck drivers at the Grenada, Mississippi facility of the Company. The agreement became effective on December 31, 1993 and remains in effect until December 31, 1997.

The specific language of the agreement provides the crux of the dispute in the present case. Article VII of the agreement, titled "Seniority," states:

> Section 1. The Company agrees that in cases of promotion and increase or decrease of forces of work,

ability, efficiency and seniority shall control. If ability and efficiency are approximately equal, seniority shall be the controlling factor. Seniority shall be departmental seniority in the following departments: (1) flooring mill; (2) saw mill and power plant; (3) yard and kiln.

. . .

Section 4. When a vacancy comes open in a department caused by an employee quitting or becoming discharged or a new job is created, those employees holding seniority in the plant working on lower paid jobs may apply for the job under the following conditions:

(a) Such job vacancies that come open will be posted on the bulletin board for three (3) working days. Flooring plant employees shall have the right to bid laterally or upgrade on another shift in the flooring plant. . . .

(b) The employee who bids for such job who has the skill, training, experience and ability to perform the job will be given an opportunity to perform the job. If two (2) or more employees bid for the job with relatively equal qualifications, the person with the longest seniority will be given an opportunity to perform the job. Notwithstanding anything else to the contrary, the determination by the Company of the employee's qualifications for the job or his performance of such job shall not be subject to arbitration as provided for in Article IX of the Agreement.

Article VII of the agreement, titled "Grievance Procedure," states in relevant part:

Section 1. A grievance within the meaning of this provision shall include all disputes involving or arising out of the interpretation, application or alleged violation of the terms of this Agreement.

. . .

Section 3. . . . If the parties are unable to resolve the matter in dispute through discussions, the aggrieved party may refer the dispute to arbitration for resolution in accordance with arbitration procedure hereinafter provided, following notice by the aggrieved party to the other of its desire to submit the matter to arbitration.

Finally, Article IX of the agreement, titled "Arbitration," states in relevant part:

> Section 1. If the grievance or matter in dispute is not settled under the grievance procedure as set forth above, the aggrieved party (Union or Employer) may refer the matter to arbitration by serving written notice on the other party of a desire to arbitrate the dispute within five (5) days from the date the matter was handled in the final step of the grievance procedure.

In September of 1995, the position of Lift Truck Driver became vacant. On October 9, 1995, the Company posted the required notice, stating that the position was vacant and inviting employees to submit their names to be considered for the position. Seventeen employees or "bidders," including one Henry Collins, submitted their names for consideration.

According to affidavits filed by the Company, the Company then engaged in an evaluation of the qualifications of the bidders. The Company's plant manager, Lawrence E. Melton, evaluated the qualifications and abilities of most of the bidders based on his personal observations of the bidders over the course of their employment. For those bidders which Melton had not personally observed, he conferred with the night shift foreman, who had personally observed their qualifications and abilities, for purposes of his evaluation. Melton also evaluated the absenteeism records of all employees who bid for the job.

At the end of this evaluation process, Henry Collins was offered the vacant position of Lift Truck Driver. According to the Company, Melton determined that Collins was the "most" qualified applicant for the job based on Collins' successful

performance of the job on a prior temporary basis, his successful performance of the same job at a prior employer who had been contacted, and Collins' above-average absenteeism record. However, the Company and the Union agree that Collins was not the most senior employee to bid for the job and that he worked in a different department than the department of the vacancy.

The Union responded by filing a grievance on or about October 23, 1995, alleging that the selection of Collins to fill the vacancy was in violation of Article VII of the agreement. The Union contended that other employees who bid for the job were also qualified to hold the position and had more seniority than Collins.

The grievance process failed to resolve the parties' disagreement. For this reason, the Union notified the Company of its intention to arbitrate the grievance. The Company refused to arbitrate the grievance, taking the position that the Company's determination of qualifications was not subject to arbitration. Thereafter, the Union filed the present action, asking this court to compel the Company to enter into arbitration. The cause is presently before the court on the parties' cross-motions for summary judgment.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) (noting that "the burden on the moving party may be discharged by

'showing' . . . that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Rule 56(e) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The Supreme Court has recognized the important role that arbitration plays in resolving labor disputes. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960). Where a collective bargaining agreement contains an arbitration clause, there is a presumption in favor of arbitration and "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the

arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960); see also Oil, Chemical & Atomic Workers Int'l Union v. Phillips 66 Co., 976 F.2d 277, 278 (5th Cir. 1992) (noting proper adherence of lower court to presumption). However, arbitration is solely a matter of contract and, notably, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Warrior & Gulf, 363 U.S. at 582; see also Marshall Durbin, Tupelo, Inc. v. United Food Workers Union, 660 F. Supp. 234, 236 (N.D. Miss. 1987) (following Warrior & Gulf). The decision as to whether the parties agreed to submit a particular issue to arbitration is a matter for judicial determination. Warrior & Gulf, 363 U.S. at 582-83; Marshall Durbin, 660 F. Supp. at 236. In making this determination, the court must limit itself to the question of substantive arbitrability and should resist "weighing the merits of the [underlying] grievance," even if the grievance appears to be without a basis in the language of the contract. American Mfg. Co., 363 U.S. at 568; Marshall Durbin, 660 F. Supp. at 236.

In the present case, neither party contends that there was any error in the grievance and arbitration procedures followed by the parties. Rather, the dispute focuses on the specific language of the contract and whether that language serves to exclude the determination of qualifications from the arbitration

clause.

The arbitration clause itself, found in Article IX of the agreement, is worded in broad language, stating that arbitration may be employed to resolve any "grievance or matter in dispute" which was not "settled under the grievance procedure." However, Article VII, Section 4(b) of the agreement provides that "[n]otwithstanding anything else to the contrary, the determination by the Company of the employee's qualifications for the job or his performance of such job shall not be subject to arbitration as provided for in Article IX of the Agreement." The Company asserts that this language applies to the present dispute, excluding any grievance relating to the hiring of Collins from the arbitration clause. While the plain language of the agreement facially supports this assertion, the Union has proffered a complex argument as to why the Company's assertion should fail.

Initially, the Union asserts that Article VII, Section 4(b) of the agreement, governing seniority, required the Company to hire the most senior employee bidding for the vacancy among those bidders who were "relatively equal" in qualifications. The Company does not contest this point. Rather, the Company points out that it determined that Collins was the "most" qualifwas not the controlling factor.

While the Union's argument comes dangerously close to asking this court to pass judgment on the merits of the underlying dispute, an analysis of the Union's position is useful. A

reading of the relevant provisions reveals that the right to determine the qualifications of the bidders was delegated to the Company by the clear language of Article VII, Section 4(b). In other words, it was the Company which was allocated the task of determining whether two or more bidders had "relatively equal" qualifications. The language of the agreement required the use of seniority as the controlling factor only if the Company, in making its determination of the bidder's qualifications, determined that two or more bidders possessed "relatively equal" qualifications.

The delegation to the Company of the right to determine the bidders' qualifications is determinative in the present action. In its Cross-Motion for Summary Judgment, the Union asserts that the underlying grievance in this case is "whether the Company awarded the position to the most senior qualified bidder, whether the Company considered relevant factors in evaluating qualifications and ability, and whether the Company undertook any such investigation at all." The first two of these issues are clearly determinations which were delegated to the Company by the language of Article VII, Section 4(b) and hence excluded from the arbitration clause. The Union counters by arguing that these issues constitute "threshold" disputes which are arbitrable despite the clear exclusion of Article VII, Section 4(b) of the agreement. However, courts have generally only been willing to find a "threshold" issue where the language of an agreement contains an ambiguous provision caused when the task of

determining the existence of a certain cause or event was not delegated to one of the parties to the agreement. For example, the Ninth Circuit examined a collective bargaining agreement that excluded from arbitration any dispute related to an employee's discharge for "violent strike conduct" in Winery, Distillery & Allied Workers Union, Local 186 v. E & J Gallo Winery, Inc., 857 F.2d 1353 (9th Cir. 1988). The Ninth Circuit held that since the agreement did not allocate to the union or the employer the determination of whether the conduct was "violent," the existence of "violent" conduct was a "threshold" issue which was subject to the general arbitration clause contained in the agreement. E & J Gallo Winery, 857 F.2d at 1355-57; see also IBEW Local 4 v. KTVI-TV, 985 F.2d 415 (8th Cir. 1993) (requiring employer to submit to arbitration where agreement excluded discharges for quality of work but did not allocate to employer "unfettered discretion" to characterize discharge so as to avoid arbitration). Similarly, the Fifth Circuit held that where a collective bargaining agreement excluded from arbitration a grievance related to an employee's discharge for "just cause," but did not allocate the determination of "just cause," that issue was arbitrable at the request of the union. Johnston-Tombigbee Furniture Mfg. Co. v. Local Union No. 2462, 596 F.2d 126, 128-29 (5th Cir. 1979).

In the present case, the determination of the bidder's qualifications was clearly allocated to the Company by Article VII, Section 4(b) of the agreement. For this reason, the only "threshold" issue that the Union can possibly point to is whether

a determination of the bidder's qualifications actually occurred. The Company has, by affidavits attached to its Motion for Summary Judgment, established that it did conduct a determination. The Union has failed to designate specific facts which would create a genuine issue for trial, claiming only that it was told by the plant manager that the Union "did not run his plant." Even if this allegation is taken as true, the statement has no bearing on whether the determination of qualification by the Company took place.

Simply put, the assertion proffered by the Union in the present case runs contrary to the specific language of the agreement. Adherence to the Union's position would require the court to construe the agreement in such a way as to render nugatory Article VII, Section 4(b) of the agreement. It is well established that a court should not so construe a collective bargaining agreement. See UAW v. Yard-Man, Inc., 716 F.2d 1476, 1480 (6th Cir. 1983) ("As in all contracts, the collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises."). In the present case, the clear, unambiguous language of the collective bargaining agreement allocates the determination of bidders' qualifications to the Company and further excludes matters relating to this determination from the arbitration clause. It is this factor which must control the court's decision.

CONCLUSION

For the foregoing reasons, the court finds that the motion

of Southern Council of Industrial Workers for summary judgment should be denied. The court further finds that Memphis Hardwood Flooring Company's motion for summary judgment should be granted in its entirety.

An order will issue accordingly.

THIS, the _____ day of April, 1997.

_____
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE